United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH NONG,

Plaintiff, **No C 04-2312 VRW**

v

ORDER

JO ANNE B BARNHART, Commissioner of Social Security,

Defendant.

_____/

Plaintiff Kenneth Nong appeals from the decision of the Social Security Administration (SSA) denying his application for social security income (SSI) under title XVI of the Social Security Act (Act). The court has jurisdiction over the appeal pursuant to 42 USC § 405(g). The court now considers cross-motions for summary judgment. For the reasons stated herein, the court DENIES plaintiff's motion and GRANTS defendant's motion.

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I

Plaintiff was born on March 8, 1954, attended school through the sixth grade in Vietnam, immigrated to the United States in 1981 and performed no substantial gainful activity after that date. He became a United States citizen in 1990. Plaintiff testified to speaking Haga, a Chinese dialect, and reading Chinese and Vietnamese. Administrative Record, Doc # 15 (AR) 43, 50, 55, 172-173, 175.

Medical records dating from before and during the pendency of plaintiff's disability application establish that plaintiff underwent several medical tests, all of which were essentially normal. A barium enema study dated March 30, 2001 was "unremarkable." An abdominal sonogram dated January 7, 2002 for "right epigastric pain" was "unremarkable." AR 97. A "biphasic upper DI series and scout abdomen" study (more commonly known as a barium swallow test) performed on May 31, 2002 revealed "normal findings." AR 100. Blood tests of the same date were negative for hepatitis A, B and C but revealed the presence of helicobacter, AR 101, which was treated with medication, AR 114. A separate blood panel revealed high levels of cholesterol, triglyceride and LDL. AR 108. A spine x-ray dated July 20, 2002 revealed "no acute abnormalities." AR 97.

On July 23, 2002, plaintiff applied for SSI benefits alleging an onset date of January 1, 1995. AR 43. His application listed "depress [sic], lost memories, headaches, dizzyness [sic], nightmare, back pain" as limiting his ability to work. AR 49.

A letter dated August 14, 2002 to the Department of Social Services by plaintiff's treating physician Patrick Wong

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assessed plaintiff as follows:

> Mr Kenneth Nong has seen me on and off on several occasions since January this year. His problem is fatty liver and spastic colon syndrome. Recently, he was found to have H pylori gastritis and I have given him treatment with triple therapy. For my stand point, I could not find any reason for his disability.

AR 114.

Plaintiff underwent an agency-ordered internal medicine evaluation with William Steinsmith, MD at Bay View Medical Clinic. A November 6, 2002 report from that evaluation relates that plaintiff appeared with a professional translator. Findings for all physiological systems were normal except for "History x 20-plus years of moderate, stable, and uncomplicated chronic low back syndrome, with moderate symptomatic/functional findings on * * * exam, as noted." AR 119. The report also noted "frequent tension cephalgias and * * * episodic nonspecific light-headedness," presumably based on plaintiff's report of symptoms. AR 117. An accompanying radiology report from the Bay View Medical Clinic found "disc narrowing at L5-S1" with "marginal anterior hypertrophic spurring and minimal posterior hypertrophic lipping" and "diffused minimal hypertrophic marginal lipping changes throughout the lumbar spine." AR 115.

Dr Steinsmith's report concluded that plaintiff could

> bear weight for four to six hours per day with suitable interval breaks * * * occasionally bend and kneel and grasp and elevate floor-level weights of 25 pounds but may experience difficulty performing activities requiring frequent bending, kneeling or lifting or performing activities requiring full brisk mobilities of the trunk on the lumbopelvic axis * * * periodically ascend or descend a flight of stairs and [] ambulate over several city blocks * * * safely commute via public transportation * * * sit in a chair for

> intervals of 30 minutes, alternating with brief intervals of altered body posture for relief of posturally exacerbated low back discomfort * * * [and] perform table-top manual or clerical tasks while retaining the seated position.

AR 119.

Plaintiff also underwent an agency-ordered psychiatric exam at the Bay View Medical Clinic with Michael Dietrick, MD. The November 8, 2002 report from the exam made note of plaintiff's reported "headaches and back pain," but concluded that plaintiff had "no psychiatric problems" and had a GAF of 85, well above the range associated with disabling mental health problems. The report assessed plaintiff's functional capacity thus: "Plaintiff is able to follow brief three part instructions immediately and repeats them from memory in three minutes. He denies any problems in object relations. He relates well to the interviewer and his interpreter. His attention span is good and he has no difficulty concentrating. He tolerates stress well and appears to be very adaptable." AR 120-22.

A Physical Residual Functional Capacity Assessment dated December 16, 2002 by internal medicine physician John Chokatos found no significant postural or exertional limitations. AR 131-39.

A blood panel from June 26, 2003 showed elevated levels of cholesterol, triglyceride and LDL, but at levels closer to normal ranges than the previous blood panel. AR 158. A July 1, 2003 barium enema was "unremarkable." AR 157. A colonoscopy conducted August 12, 2003 prompted by abdominal pain, diarrhea and intermittent rectal bleeding was normal except for diagnosis of spastic colon and internal hemorrhoids. AR 153.

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Finally, on January 13, 2004, plaintiff's treating physician Josephine Mak, MD, completed a Medical Assessment of Ability to Do Work-Related Activities (Physical). AR 163-66. The record contains numerous clinic treatment notes reflecting plaintiff's regular visits to Dr Mak in 2002 and 2003 for complaints including headaches, backaches and abdominal pains. AR 125-30; 144-51. Dr Mak's medical assessment stated that plaintiff had a "bone spur" that caused pain when plaintiff walked or stood. She checked boxes indicating that plaintiff could tolerate less than one hour of walking/standing and less than one hour of sitting, that he could lift and carry less than five pounds frequently (her handwritten note stated "after carry 3 lbs pt feels back/[illegible]"), was partially restricted from climbing stairs, was restricted in bending, required rest periods during the day, and could not work full-time due to headaches and backaches, and did not possess the residual functional capacity (RFC) even for sedentary work.

Plaintiff's application was denied initially and upon reconsideration. AR 24-34. He submitted a timely request for a hearing before an Administrative Law Judge (ALJ). AR 35.

On January 27, 2004, The ALJ opened the hearing with plaintiff, his attorney, an interpreter, medical expert (ME) Sergio Bella, MD, and vocational expert (VE) Gerald D Belchik, PhD, present. AR 167-211. Plaintiff testified that he had "constant" pain in his back whenever he moved that became less severe when he remained stationary, AR 178, headache and dizziness, AR 181, stomach and/or abdominal pain, AR 183, 186, and frequent feelings of fullness in his bowels, AR 185-86.

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Dr Bella testified that while further testing could have been conducted regarding plaintiff's back condition, the medical evidence in the record "doesn't indicate anything" and contained "no objective information" in support of plaintiff's claim of disability. AR 198. "The abdominal pain," he testified further, "while kind of tricky, I also believe is [] a mild condition." AR 198-99. He opined that the gastritis (presumably caused by helicobacter) had likely resolved with antibiotics, AR 199, and that plaintiff's bowel symptoms could be managed through behavior modification and, possibly, nutrition changes and were "a very treatable problem." AR 199-200. Dr Bella responded to questioning from plaintiff's attorney about whether his stated opinion that plaintiff's impairments were "non-severe" was intended to have the same meaning as in the legal context for social security cases. AR 200-01. The ALJ then posed the following question: "Non-severe impairments are, by regulation, defined as an impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities. Does that capsulate what you're undertaking to say?" to which the ME answered, "Thank you, yes." AR 201.

The VE testified that based on plaintiff's lack of work experience and education, with non-severe impairments he could perform "numerous jobs" including "assembler" and "production packing and packaging," both of which could be performed at the sedentary, light and medium exertional levels. AR 206-07. Plaintiff's attorney then elicited from the VE testimony that: an individual who could not sit for more than thirty minutes could not perform sedentary work; that there are no light work jobs "that

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don't require some body movement"; and that taking ten to fifteen unscheduled breaks per month would be inconsistent with maintaining employment. AR 208-09.

On February 3, 2004, the ALJ issued a decision finding plaintiff not disabled because he had no severe impairments. AR 11-16. Applying the five-step sequential disability analysis set forth at 20 CFR § 416.920 (infra), the ALJ found that plaintiff had engaged in no substantial gainful activity since the alleged onset date (step one) and that he had no severe impairment or combination of impairments — that is, that "significantly limits an individual's physical or mental ability to do basic work activities" (step two). AR 12. Having found no severe impairment, the ALJ found plaintiff not disabled. The decision stated that the medical record provides "no objective evidence that the claimant has significant limits on his physical or mental ability to do basic work activities," and contained a detailed recital of all the medical reports previously mentioned above. AR 12-14.

The ALJ discounted the one medical report — by treating physician Dr Mak — that found him disabled and also discounted plaintiff's own testimony. Regarding Dr Josephine Mak's RFC assessment, the ALJ commented that there is "no objective medical evidence on which to base these opinions" and that it appeared to be advocacy. AR 14. In support of his finding that "claimant's allegations and subjective complaints are not totally credible and not supported by substantial medical evidence," AR 12, the ALJ noted that plaintiff drove his son to school, walked twenty minutes per day and shopped, activities "inconsistent with his testimony that he is only able to stand for 10 minutes at a time." AR 14.

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The Appeals Council declined review, making the ALJ's decision final. AR 4-6. Plaintiff timely requested judicial review.

II

In appealing the SSA's final decision, plaintiff contends the ALJ erred in discounting his own testimony and Dr Mak's assessment and contends that the ALJ failed to assess his impairments alone or in combination, failed to assess his subjective complaints of pain properly and improperly rejected the testimony of the VE. The court disagrees with these contentions. On the contrary, the ALJ applied the SSA's regulations governing disability determinations correctly. Because his conclusions are supported by substantial evidence, the court affirms his decision.

The court's jurisdiction is limited to determining whether the SSA's denial of benefits is supported by substantial evidence in the administrative record. 42 USC § 405(g). A district court may overturn a decision to deny benefits only if the decision is not supported by substantial evidence or if the decision is based on legal error. See Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995); Magallanes v Bowen, 881 F2d 747, 750 (9th Cir 1989). The Ninth Circuit defines "substantial evidence" as "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Andrews, 53 F3d at 1039.

The SSA's regulations specify in detail how an ALJ is to approach the task of determining whether a claimant is disabled. 20 CFR § 416.920 sets forth a five-step sequential analysis for

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ALJs to use in evaluating claims of disability: (1) first, the ALJ considers whether the claimant is currently employed in substantial gainful activity; (2) if not, the second step asks whether the claimant has a severe impairment; (3) in step three, the ALJ determines whether the claimant has a condition which meets or equals any listed condition according to the criteria set forth in the Listings of Impairments in Appendix 1, Subpart P of Part 404; (4) if the claimant does not have such a condition, step four asks whether the claimant can perform his past relevant work; (5) if not, in step five the ALJ considers whether the claimant has the ability to perform other work which exists in substantial numbers in the national economy. 20 CFR § 416.960(c). The ALJ's analysis of plaintiff's disability stopped at step two with a determination that he has no severe impairment or combination of impairments.

In addition, the regulations cover in detail how different types of evidence are to be weighed against each other. Several provisions are directly on point in this case. 20 CFR § 416.929(b), entitled "how we evaluate symptoms, including pain," effectively disposes of plaintiff's challenges to the ALJ's handling of his pain testimony:

> Your symptoms, such as pain * * * will not be found to affect your ability to do basic work activities unless medical signs or laboratory finding show what a medically determinable impairment(s) is present. Medical signs and laboratory findings, established by medically acceptable clinical or laboratory diagnostic techniques, must show the existence of a medical impairment(s) which results from anatomical [or] physiological * * * abnormalities and which would reasonably be expected to produce the pain or other symptoms alleged.

Substantial evidence in the record supports the ALJ's conclusion

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that the required medical signs and laboratory findings that would require him to give credence to plaintiff's pain testimony are absent. The ME observed that other tests were available to assess plaintiff's back, but that the evidence in the record showed only "minimal" changes. AR 198, 202-03. The clear thrust of the ME's testimony was that the changes noted on plaintiff's x-ray could not "reasonably be expected to produce the pain or other symptoms alleged."

20 CFR § 416.927(d), in the regulation entitled "evaluating opinion evidence," covers "how we weigh medical opinions." It explains that the ALJ evaluates every medical opinion and generally gives more weight to treating sources. A treating physician's opinion is given "controlling weight" only if "well-supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with the other substantial evidence" in the record. In this case, the ALJ properly gave controlling weight to the opinion of Dr Wong, but did not do so with the opinion of Dr Mak. If an ALJ does not give controlling weight to a treating source, he must consider other factors, including length of the treatment relationship and frequency of examination, nature and extent of the treatment relationship, supportability, consistency, specialization and other factors. § 416.927(d)(2)-(6). Regarding supportability, the regulation provides: "[t]he more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion." § 416.927(d)(3). This disposes of plaintiff's challenge to the ALJ's decision to discount the opinion of Dr Mak, as her opinion

was not supported by medical signs and laboratory findings and was contrary to substantial other evidence in the record. Moreover, "[a] physician's opinion of disability 'premised to a large extent upon the claimant's own accounts of his symptoms and limitations' may be disregarded where those complaints have been 'properly discounted.'" Morgan v Comm'r of Soc Sec Admin, 169 F3d 595, 602 (9th Cir 1999), quoting Fair v Bowen, 885 F2d 597, 603 (9th Cir 1989). The ALJ is responsible for resolving conflicts in medical testimony and resolving ambiguity. Morgan, 169 F3d at 603.

The ALJ's decision specifies in detail the weight he gave to the testimony or opinion of each witness or opining medical doctor. The ALJ's weighing of the evidence is well-supported by substantial evidence in the record. The ALJ's failure to discuss the VE's testimony was not error because substantial evidence supported his determinations that plaintiff did not have any severe impairment or combination of impairments and was not disabled.

The clerk is directed to enter judgment in favor of defendant and against plaintiff. The clerk is further directed to close the file and terminate all pending motions.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

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